

**Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.**

DATE: May 27, 1998
CASE NO: 97-INA-424

In the Matter of:

ANP LACE CORPORATION
Employer

On Behalf of:

ROSALINA UMANZOR
Alien

Appearance: Harlan E. Shackner, Esq.
West Orange, NJ
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States

who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,¹ and any written argument of the parties. §656.27(c).

Statement of the Case

On September 8, 1995, ANP Lace Corp. ("employer") filed an application for labor certification to enable Rosalina Umanzor ("alien") to fill the position of Maintenance Mechanic at an hourly wage of \$17.09 (AF 53). The job duties are described as follows:

Repairs and maintains, in accordance with diagrams, sketches, operation manuals, and manufacturer's specifications, Reiner/Plauen 10 yard embroidery machines for manufacture of lace, using hand tools, power tools & precision measuring and testing instruments. Observes mechanical devices in operation and listens to their sounds to locate causes of trouble. Dismantles devices to gain access to and remove defective parts, using hand tools & power tools. Examines form & texture of parts to detect imperfections. Inspects used parts to determine changes in dimensional requirements, using rules, calipers, micrometers and other measuring instruments. Adjusts functional parts of devices and control instruments using hand tools, levels, plumb bobs and straightedges. Repairs and replaces defective parts using hand tools and power tools. Installs special functional and structural parts in devices, using hand tools. Sets up and operate[s] lathe, drill press, grinder and other metalworking tools to make and repair parts. Initiates purchase order for parts and machines. Repairs electrical equipment. Starts devices to test their performance. Lubricates and cleans parts.

The job requirements are two years of experience in the job offered or two years of experience in the related occupation of "Reiner/Plauen Embroidery Machine Repairer (Lace Manufacture - Trainee)."

On October 10, 1996, the CO issued the Notice of Findings proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job. The CO noted that the alien had no experience in the job offered prior to her employment with the employer. The CO also found that the employer's alternate requirement is not a related occupation, but that it actually constitutes training for the position. Therefore, she determined that the employer trained the alien for the position. The CO stated this finding may be rebutted by: (1) submitting evidence which clearly shows that the alien at the time of hire had the

¹ All further references to documents contained in the Appeal File will be noted as "AF."

qualifications now required, (2) submitting evidence that it is not feasible to train someone else at this time, or (3) eliminating the requirements and documenting a willingness to train a U.S. worker.

In rebuttal, dated November 12, 1996, the employer argued that it is unable to train another worker for the position because the company has undergone marked expansion in recent years (AF 42). Mr. Assuntino Pagnozzi, who is president of the company, stated that he initially trained the alien to perform the position but indicated that he no longer is able to because he now has many additional responsibilities which he must carry out. The employer also argued that the lace industry is becoming increasingly dominated by huge factories in China and the Philippines which necessitates that it keeps the overall operating expenses low.

The CO issued the Final Determination on November 22, 1996, denying the labor certification. The CO rejected the employer's argument that the company did not have the time or resources to train a new employee and found that the evidence does not establish that the business conditions have changed to such a degree that it is now not feasible to train a U.S. worker. On December 10, 1996, the employer requested review of Denial of Labor Certification pursuant to §656.26 (b) (1) (AF 62).

Discussion

The issue presented by this appeal is whether the employer specified the minimum job qualifications for the offered position pursuant to §656.21 (b) (5).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired workers with less training or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires for the alien, and prevents the employer from treating an alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990). It is well settled that an employer violates §656.21 (b) (5) if it hired the alien with lower qualifications than those specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. See *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MM Mats, Inc.*, 87-INA-540 (Nov. 24, 1987). Furthermore, the Board also has held that under §656.21 (b) (5), an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991).

In this case, the employer argued that it is infeasible to train a U.S. worker to fill the offered position because the company has neither the time or the resources to train a worker. In

support of this argument, the employer reported that since the alien's time of hire, the company's volume of business has expanded by over 50 percent and the staff has increased from two employees to seven (AF 43). The company's president, Mr. Pagnozzi, stated that he originally trained the alien, but indicated that he is now unable to train a U.S. worker because of increased responsibilities which have coincided with the company's growth.

In *Super Seal Manufacturing Co.*, 88-INA-417 (Apr. 12, 1989) (*en banc*); *AEP Industries*, 88-INA-415 (Apr. 4, 1989) (*en banc*), the Board addressed this issue and held that an increase in the volume of business or general growth and expansion, by itself, is insufficient to establish infeasibility to train. The Board explained that unless an employer proves otherwise, increased training capability is presumed to accompany growth. *See also Anderson-Mraz Design*, 90-INA-142 (May 30, 1991); *Primex Plastics Corp.*, 89-INA-283 (Apr. 8, 1991); *Ramazzotti Landscaping, Inc.*, 90-INA-78 (Feb. 22, 1991); *58th Street Restaurant Corp.*, 90-INA-58 (Feb. 21, 1991); *Able Labs*, 90-INA-54 (Jan. 29, 1991); *J.J. Cassone Bakery, Inc.*, 89-INA-74 (Feb. 20, 1990); *Laura's French Baking Co.*, 89-INA-61 (Jan. 31, 1990). Based on the employer's rebuttal, we find that the employer failed to overcome this presumption. *See also California-Nevada Annual Conference of the United Methodist Church*, 88-INA-364 (June 28, 1989) (the Board held that the burden rests with the employer to document why it is no longer feasible to provide training that was once available to the alien). Accordingly, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals

***800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.